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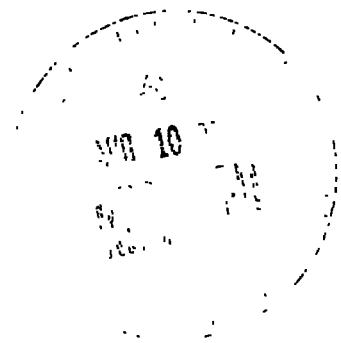

August 10, 2012

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Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E. Street, S.W.
Washington, D.C. 20423

ENTERED
Office of Proceedings
AUG 10 2012
Part of
Public Record

Re: E.I. DuPont De Nemours & Company v. Norfolk Southern Railway Company, STB Docket No. 42125

Dear Ms. Brown:

Enclosed for filing in the above-referenced matter are the original and ten copies of an Errata to Defendant Norfolk Southern Railway Company's ("NS's") Motion to Hold Case in Abeyance, filed on August 6, 2010. Also enclosed are 3 computer disks containing an electronic copy of the attached Errata. NS files this Errata to correct three single-word typographical errors it has identified in its August 6 Motion.

The Errata makes the following corrections to NS's Motion:

Page 2: The first sentence of the first full paragraph has been corrected from "Part I of this Memorandum..." to "Part I of this Motion..."

Page 19: The parenthetical in the second sentence has been corrected from "(because the Board had issued a remand decision at that time)" to "(because the Board had not issued a remand decision at that time)".

Page 24: The second sentence in footnote 10 has been corrected from "On that issue, the Board granted the Petition for review..." to "On that issue, the Court granted the Petition for review...."

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NS requests that this letter and the accompanying Errata be accepted for inclusion into the record of this proceeding. Please file-stamp the additional copies of the attached Errata and return them with our messenger for our files.

Thank you for your assistance. Should you have any questions or need additional information, please contact me.

Sincerely,

Paul A. Hemmersbaugh

Enclosures

cc: Jeffrey O. Moreno

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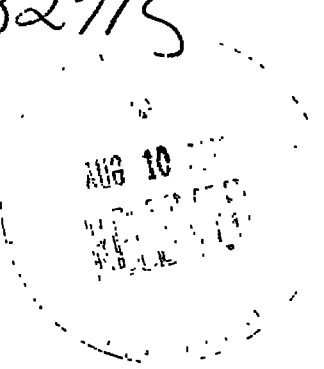

BEFORE THE
SURFACE TRANSPORTATION BOARD

E.I. DUPONT DE NEMOURS & COMPANY	)	
Complainant,	)	***ERRATA***
v.	)	**Docket No. NOR 42125**
NORFOLK SOUTHERN RAILWAY COMPANY	)	
Defendant.	)	

ERRATA TO NORFOLK SOUTHERN RAILWAY COMPANY'S MOTION TO HOLD CASE IN ABEYANCE PENDING COMPLETION OF RULEMAKING

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Dated: August 10, 2012

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BEFORE THE
SURFACE TRANSPORTATION BOARD

E.I. DUPONT DE NEMOURS & COMPANY	)	
Complainant,	)	***ERRATA***
v.	)	**Docket No. NOR 42125**
NORFOLK SOUTHERN RAILWAY COMPANY	)	
Defendant.	)	

ERRATA TO NORFOLK SOUTHERN RAILWAY COMPANY'S MOTION TO HOLD CASE IN ABEYANCE PENDING COMPLETION OF RULEMAKING

Defendant Norfolk Southern Railway Company ("NS") hereby moves the Board to hold this maximum reasonable rate case in abeyance pending the establishment—through notice-and-comment rulemaking—of critical standards for the Board's Stand Alone Cost ("SAC") test. STB Ex Parte 715, *Rate Regulation Reforms*, NPRM at 6-8, 16-18 (served July 25, 2012) (hereinafter "*Rate Regulation Reforms*"). DuPont's excessive and abusive use of cross-over traffic, and its application of an invalid method of allocating cross-over traffic revenue, embody two core problems the Board seeks to remedy in the pending *Rate Regulation Reforms* rulemaking.

Pervasive and increasing misuse of cross-over traffic in SAC cases has created a compelling, immediate need for new cross-over traffic limits and rules. Recognizing that expanded use and contortion of the cross-over traffic device – particularly on networks carrying carload or multiple-car shipments such as DuPont's standalone railroad in this case – is increasingly distorting SAC analyses, the Board has commenced a proceeding to establish rules limiting the use and manipulation of cross-over traffic. *See Rate Regulation Reforms* at 16-18. Such rules and limits are overdue: Misuse of cross-over traffic threatens the coherence, rigor,

accuracy, and legitimacy of the Board's gold standard for rail rate challenges, the Stand Alone Cost analysis.[1] This case presents those dangers in spades, and the Board should address them by applying the rules and methods it develops in *Rate Regulation Reforms*.

Part I of this Motion explains why holding this case in abeyance pending establishment of new and revised rules is reasonable, necessary, and fair. It explains how this case seeks to expand the cross-over traffic device radically while simultaneously exacerbating the distortions of the SAC analysis that caused the Board to propose new rules and limits on cross-over traffic in *Rate Regulation Reforms*. Part II discusses reasons that holding this case in abeyance during the rulemaking is superior to attempting to establish cross-over traffic limits and rules by litigating the issues in this individual case. And Part III explains that, as a matter of law, the revenue allocation methodology used by DuPont in its opening evidence cannot be applied to this case. Unless the Board addresses these issues through a rulemaking, it is certain to be presented with a complex record in this case that will require resolution of the very issues identified in EP 715. Fairness to the parties and sound principles of administrative law require suspension of the procedural schedule herein pending the orderly and considered resolution of these issues.

I. FUNDAMENTAL FAIRNESS DICTATES THAT THE BOARD HOLD THIS CASE IN ABEYANCE PENDING THE ISSUANCE OF NEW CROSS-OVER TRAFFIC RULES BECAUSE CURRENT RULES ARE UNSOUND AND IN FLUX.

The Board has effectively acknowledged that cross-over traffic rules are broken and need to be fixed. *Rate Regulation Reforms*, at 16-18. Accordingly, it has initiated a rulemaking

[1] The Board has repeatedly admonished that cross-over traffic was intended only to be a "simplifying" device to allow SAC complainants a more manageable way to take advantage of economies enjoyed by the incumbent, *without introducing bias or distortion* to the SAC analysis. *See, e.g., Major Issues in Rail Rate Cases*, STB Ex Parte 657 (*"Major Issues"*) Decision at 24 (Oct. 30, 2006). However, rate case complainants have instead transformed cross-over traffic into a device to manipulate, bias, and distort SAC analysis and results.

proceeding to fix those rules. *Id.* It would be unfair and irrational to apply broken rules to NS in this case, and unwise and inefficient to attempt to create alternative rules in the context of this single case.

A. DuPont's Abuse of Cross-over Traffic and Invalid Revenue Allocation Method Exemplify the Concerns Expressed in the New Rulemaking.

The *Rate Regulation Reforms* NPRM explains some of the problems with current cross-over traffic rules. In particular, it discusses the Board's concern about the distorting effect of cross-over traffic as complainants increasingly rely upon and expand it. *Rate Regulation Reforms* at 16-17. Such distortion from use of the cross-over traffic device is a result that railroad defendants have long recognized and asked the Board to guard against. The Board now has proposed rules to limit the use of cross-over traffic. *Id.* at 17.

The NPRM also reviewed the recent history of methods for allocating cross-over traffic revenues between the SARR and the residual incumbent. *Id.* at 6-8, 16-18. The Board expressed dissatisfaction with both the ATC method adopted in notice-and-comment rulemaking and Amended ATC, the *ad hoc* new method the Board applied in *Western Fuels*[2]. The NPRM proposes a third alternative method while soliciting other alternative proposals. *Id.* at 17-18. The Board also effectively acknowledged that the method it created and applied *sua sponte* in an individual rate case (*Western Fuels*) allocates crossover traffic revenues in a manner that inadequately accounts for economies of density. *See id.* Thus, despite the decision of the majority of a divided Board to apply Amended ATC in the long-running *Western Fuels* case, the unanimous Ex Parte 715 NPRM essentially concedes that this *ad hoc* method is not appropriate

[2]The new approach applied in *Western Fuels* has sometimes been referred to as "Modified ATC." Because the approach is more accurately referred to as "Amended ATC," NS uses that term in this Motion. *See infra* Part III.

for other cases or for the longer term.[3] *Compare* Decision, *Western Fuels Ass'n et al v. BNSF Railway Co.*, STB Docket No. 42088 (served June 15, 2012) *with* NPRM, *Rate Regulation Reforms* at 6-8, 16-18. Although the NPRM expressed concern about whether it would be fair to complainants to apply improved rules to pending cases, it plainly would be unfair to apply to NS cross-over traffic rules that the Board has acknowledged are seriously flawed.

1. DuPont's Overwhelming Reliance on Cross-over Traffic Distorts the SAC Analysis.

This case exemplifies the Board's concerns about expanded use of cross-over traffic in a manner that distorts the SAC analysis and potentially undermines the legitimacy of rate case results. Describing some of the reasons that a rulemaking to limit cross-over traffic is necessary, the Board stated,

> [t]he inclusion of large amounts of carload and multi-carload cross-over traffic has revealed a significant and growing concern. There is a disconnect between the hypothetical cost of providing service to these movements over the segments replicated by the SARR and the revenue allocated to those facilities. . . . In recent cases, litigants have proposed SARRs that would simply hook up locomotives to the train, would haul it a few hundred miles without breaking the train apart, and then would deliver the train back to the residual defendant. All of the costs of handling that kind of traffic (meaning the costs of originating, terminating, and gathering the single cars into a single train heading in the same direction) would be borne by the residual railroad. . . . As a result, the SAC analysis appears to allocate more revenue to the facilities replicated by the SARR than is warranted.

Rail Regulation Reforms, NPRM at 16. To address this disconnect and overstatement of SARR revenues, the Board has proposed to limit the use of cross-over traffic, either by requiring the

[3] As Commissioner Begeman cogently demonstrated in her dissent in the *Western Fuels* remand, it is not fair to SAC case parties (complainants or defendants) for the Board to apply an admittedly inferior cross-over traffic revenue allocation methodology in an ongoing case at the very same time the Board is conducting a notice-and-comment rulemaking to adopt a more considered, better, and sound replacement methodology. *See* Decision, *Western Fuels Ass'n et al v. BNSF Railway Co.*, STB Docket No. 42088 ("*STB Remand Decision*"), slip op at 13-14 (served June 15, 2012).

SARR to originate or terminate any cross-over traffic movements, or by limiting cross-over traffic to movements that are handled entirely in trainload service by the defendant railroad in the real world. *See id.* at 16-17.

DuPont's SARR is a perfect illustration of the distorting use of cross-over traffic, about which the Board is rightly concerned. According to DuPont, approximately 79 percent of DRR traffic by revenue is cross-over traffic.[4] *See* DuPont Open. at III-A-18, Table III-A-7. Thus, four-fifths of all DRR revenue is generated by traffic that relies on the very device that so concerned the Board that the agency commenced a rulemaking to address it. *See Rate Regulation Reforms.*

Moreover, based upon DuPont's own workpapers, fully forty percent of all general freight (merchandise) traffic selected for the DRR would treat the SARR as a bridge carrier that neither originates nor terminates the cross-over traffic. *See* DuPont DuPont Opening workpaper "DUPONT_ATC_URCS_VARIABLE_COST_INPUTS_2010_040912.xls". Overall, approximately 33 percent of all DRR traffic by carload, and 36 percent of DRR revenue would move as cross-over traffic that is neither originated nor terminated by the DRR. *See id.*[5]; *see also* NPRM at 16 (expressing concern about growing "disconnect between the hypothetical cost of providing service to [cross-over] movements over segments replicated by the SARR and revenue

[4] DuPont has postulated the largest and most complex SARR network ever presented. The Dupont Railroad ("DRR") network consists of 8091 route miles, which dwarfs any other SARR network the Board has previously analyzed. See Dupont Open. III-B-1 to III-B-4. The 23 separate main lines and 36 branch lines of the DRR cover 20 States and claim to replicate the heart of the NS system. See id.; DuPont Open. Ex. III-A-1. Moreover, the core network is a carload or general freight network – not a unit train network – which requires extensive yard operations, collecting cars from customers, building blocks, combining blocks into trains, moving those trains to yards to be broken apart and reclassified into new blocks and trains, and delivery to customers.

[5] These proportions are based upon Dupont's workpapers. NS has identified myriad errors in DuPont's cross-over traffic revenue allocations. Therefore, NS does not necessarily agree that DuPont's allocations are correct. NS uses DuPont's calculations in this Motion solely to illustrate the substantial proportion of SARR revenues that DuPont attributes to movements that the DRR would neither originate nor terminate.

allocated to those facilities" which results in allocation of "more revenue to the facilities replicated by the SARR than is warranted.").

For the 40 percent of general freight traffic that the DRR does not originate or terminate, DuPont generally assumes that residual incumbent NS would perform most of the time-and-resource intensive work of building local trains to deliver empties to the origins for loading and then picking up the loaded cars. servicing and inspecting equipment, assembling and moving trains to the interchange with the SARR, receiving the shipments from the SARR, moving them to a serving yard, and building local trains to deliver the shipments to destination and to return to pick-up the empties. As the Board aptly summarized, "[a]ll of the costs of handling that kind of traffic (meaning the costs of originating, terminating, and gathering the single cars into a single train heading in the same direction) would be borne by the residual railroad. . . . As a result, the SAC analysis appears to allocate more revenue to the facilities replicated by the SARR than is warranted." *See Rail Regulation Reforms*, NPRM at 16.

The Board's concern about the disconnect between the revenues the SARR is allocated and the relative costs that are incurred is even more strongly implicated for shipments that DuPont would leave to the residual NS to originate or terminate on dozens of branch lines. By selecting all of the traffic that traverses the mainlines but not constructing the vast majority of more than 3,000 miles of NS's branch lines on the NS system, DuPont seeks to require NS to incur the higher-cost operations to serve the branch lines and handle the traffic to or from the mainlines over which the DRR would operate.

DuPont's SAC presentation thus proposes to use cross-over traffic to force the residual incumbent to bear the most significant costs of moving DRR general freight traffic (*i.e.* those costs associated with originating cars, blocking cars and building trains on both ends of the

movement, and terminating cars), while simultaneously over-allocating cross-over revenue to the DRR's movement of trainload shipments. This approach, which simultaneously understates DRR costs and overstates its revenues, applies to 40 percent of DRR general freight traffic and 33 percent of all DRR traffic. The potential distortion of SARR costs and revenues is apparent. As a result of DuPont's use of cross-over traffic alone, it has substantially understated the DRR's SAC revenue requirement and substantially overstated DRR revenues available to meet that revenue requirement. If allowed, this distorting approach would substantially skew the results of the SAC analysis in DuPont's favor, rendering the entire analysis and results unreliable and inaccurate.

2. DuPont's Opening Evidence Radically Expands the Notion of Cross-Over Traffic Beyond Anything Previously Submitted to the Board with the Use of "Leapfrog" Trains.

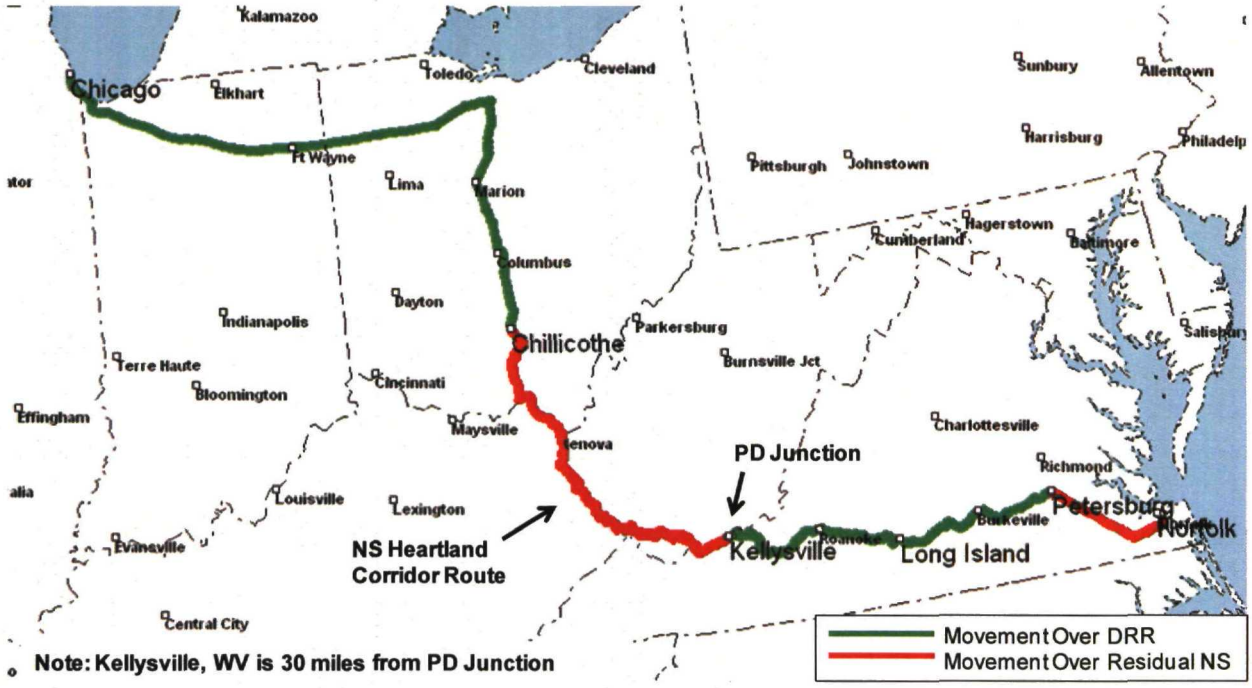
DuPont has also introduced new and unprecedented manipulations of cross-over and overhead traffic. In its opening evidence, DuPont proposes to expand the construct of cross-over traffic dramatically to allow the DRR to interchange traffic to the residual NS multiple times, forcing NS to move the traffic on as many as three separate, discrete segments, notably including segments within the geographic footprint of the SARR network. *See, e.g.* DuPont Open at III-C-22 to III-C-24. NS refers to these movements as "Leapfrog" trains, because the SARR effectively seeks to leap over difficult or costly segments in the interior of the SARR network.

DuPont's proposal would take manipulation of cross-over traffic to an entirely new level. By assuming that NS would move DRR traffic over certain interior segments, DuPont seeks to avoid the costs of building, maintaining, and operating expensive segments of what should be the SARR network. For example, in a routing followed by several different "Leapfrog" trains, one of several segments that DuPont carves out of the DRR network (and therefore leaves for the

residual NS to handle) traverses the most difficult terrain of the "Heartland Corridor," between Roanoke, Virginia and Chillicothe, Ohio. *See* DuPont Open. at III-C-23. That segment—on which NS recently completed an a very expensive project to open the route to higher speed, double-track trains—goes through very mountainous terrain, with steep grades and challenging curves, and it contains numerous tunnels and bridges.

One example of DRR Leapfrog trains that traverse the Heartland Corridor are trains that run between Chicago and Norfolk. The #234 is an eastbound train that originates in Chicago, runs over DRR to Bellevue OH, turns south to Chillicothe, where the DRR would hand the train back to NS, which would carry the train over the Heartland Corridor to PD Junction, West Virginia, where the train would be interchanged back to the DRR, to move to Petersburg, VA, where the DRR would then hand the train back to NS for movement to Norfolk and its destination. *See* DuPont DuPont Errata WP "Link between RTC and NS Train Names.xlsx." This particular Leapfrog movement is illustrated on the following map.

Leapfrog Train #234 Example: Chicago, IL-DRR-Chillicothe, OH-NS-PD Junction, WV-DRR-Petersburg, VA-NS-Norfolk, VA



Positing that NS would build and operate the Heartland Corridor allows the DRR to avoid the very substantial costs of constructing and operating that line (which includes numerous tunnels that would be costly to replicate), while still allowing the DRR to collect revenues from moving traffic over less expensive segments of the route. Carried to its logical conclusion, this tactic could allow a complainant to avoid any expensive segment or facility on its SARR network traversed by non-issue traffic (even a single expensive bridge or tunnel), simply by assuming the residual incumbent will construct and operate that facility, and act as a bridge carrier for the SARR.

Another example is Train #236, which also departs from Chicago, IL on the DRR. The DRR would move the train to Fort Wayne, IN, where it would be forwarded to the residual NS. The train would then move over a Leapfrog segment on the residual NS from Fort Wayne to

Cincinnati, OH, where it would be interchanged back to the DRR. Next, the DRR would operate the train to Emory Gap, TN, where it would be forwarded to the residual NS again, for movement over another Leapfrog segment, from Emory Gap to Knoxville, TN. At Knoxville the train would be interchanged back to the DRR, for movement to Petersburg, VA, where the DRR would again transfer the train to the residual NS. After three different segments on the DRR and five interchanges between the DRR and the residual NS, the third segment handled by the residual NS would move the train to its destination at Norfolk, VA. As the following map illustrates, the DRR fails to construct or operate three interior segments of that lane, assuming the residual NS would incur all of the costs necessary to move the traffic over those segments.

Leapfrog Train #236 Example: Chicago, IL-DRR-Ft Wayne, IN-NS-Cincinnati, OH-DRR-Emory Gap, TN-NS-Knoxville, TN-DRR-Petersburg, VA-NS-Norfolk, VA

This new gamesmanship goes much too far, employs a gambit that has never been recognized by the Board under its existing rules, and must not be allowed. If this sort of "cross-over" traffic were to become common, it would knock the legs out from under SAC principles and analysis and render the SAC process and test meaningless. This is distortion and abuse of the cross-over traffic device beyond any the Board has previously contemplated. The Board should nip this attempted manipulation of the process in the bud by holding this case in abeyance while it develops cross-over traffic limitations and rules in the pending *Rate Regulation Reforms* rulemaking. Taken together, DuPont's use of Leapfrog trains and other distorting cross-over traffic tactics make its opening evidence a poster child for cross-over traffic abuse and the resulting distortion of SAC analysis and results.

3. It Would Be Arbitrary, Capricious, and Unfair to Allow DuPont to Employ the Distorting Practices and Assumptions the Board Seeks to Curtail in the Pending Ex Parte 715 Rulemaking.

It would be unfair and arbitrary for the Board to acknowledge flaws and distortions in the way cross-over traffic is used and develop rules to eliminate those problems, while simultaneously permitting DuPont to pursue a case founded on the very type of cross-over traffic that the Board's rulemaking has identified as problematic and distorting. *See Rate Regulation Reforms.* The unfairness would be particularly acute in this case, which presents more extensive and more egregious cross-over traffic distortions than any case the Board has previously considered. Effectively, the Board has acknowledged a significant and growing problem undermining the rigor and legitimacy of SAC analysis, announced a plan to limit the distortions and abuses it has identified, and then refused to apply those limitations and remedies to the most egregious offender to date. *Rate Regulation Reforms,* at n. 11. Allowing DuPont to employ cross-over traffic in a way the Board believes is significantly flawed could yield an indefensible, arbitrary and capricious maximum reasonable rate decision.

NS's Reply evidence will show the challenged rates are reasonable (which is the reason DuPont was forced to engage in cross-over traffic gimmickry and manipulation of the evidence and analysis through various other devices and shortcuts in its SAC submission). But NS would be unfairly prejudiced if the Board were to find otherwise based on a SAC analysis using flawed cross-over traffic evidence and rules at the very same time the Board is conducting a rulemaking to limit cross-over traffic and reform governing rules. The Board expressed concerns about fairness to complainants. *Id.* But fairness is a two-way street. The Board's fairness concerns must extend to the use of cross-over traffic to generate a distorted result that would be highly prejudicial to NS.

Not only would moving this case forward under existing cross-over traffic rules be arbitrary and fundamentally unfair to NS, it would mean that the questions of proper limits on cross-over traffic and tactics likely would be litigated in this individual case (and on appeal) at the same time the Board is conducting a rulemaking designed to address, for all future cases, the same issue. Such duplicative proceedings would be wasteful. Equally important, they would pose a risk of divergent or inconsistent rules and outcomes, which would create more confusion and uncertainty about applicable rules, and likely lead to more litigation by parties who prefer one set of rules to another.

In sum, sound policy, the integrity of the SAC process, avoidance of unnecessary additional litigation, and fundamental fairness all militate in favor of the Board holding this case in abeyance, conducting an expedited rulemaking, and then applying new cross-over traffic and revenue allocation rules to this pending case.

B. Cross-Over Traffic Revenue Allocation

1. Future Use of the *Western Fuels* Amended ATC Methodology Is Doubtful.

The Board adopted the "Average Total Cost" revenue allocation methodology in an extensive rulemaking. *See generally, Major Issues in Rail Rate Cases,* STB Ex Parte No. 657 (October 30, 2006). A number of shippers and rail carriers sought judicial review of the rules adopted in *Major Issues.* The Court of Appeals for the District of Columbia Circuit denied the petitions for review and upheld those final rules – including the ATC revenue allocation methodology – in their entirety. *See BNSF Railway Co. v. STB*, 526 F.3d 770 (D.C. Cir. 2008). The ATC methodology is thus the only cross-over traffic revenue allocation methodology adopted in notice-and-comment rulemaking and judicially affirmed.

Subsequently, the Board attempted to amend the ATC methodology in an adjudication in which neither NS nor other interested parties had an opportunity to participate. *See Western Fuels v. BNSF,* Decision at 14 STB Doc. No. 42088 (served Sept. 10, 2007) ("*Western Fuels I*"); *id.*, Decision at 12-13 (Feb. 18, 2009) ("*Western Fuels II*"). The D.C. Circuit granted BNSF's petition for review with respect to the Board's *ad hoc* creation and application of a different cross-over traffic revenue allocation methodology (Amended ATC), and remanded the case to the Board. *See BNSF Railway Co. v. Surface Transp. Board*, 604 F.3d 602, 613 (D.C. Cir. 2010). Recently, the Board issued a new decision defending its application of Amended ATC in the *Western Fuels* case, which BNSF has already appealed. *See* Decision, *Western Fuels v. BNSF Railway*, STB Docket No. 42088 (served June 15, 2012) ("*STB Remand Decision*").

The *STB Remand Decision* and the pending appeal of that decision create renewed uncertainty about the lawfulness of the Board's application of Amended ATC, even in that individual case. By a 2-1 vote, the Board affirmed its application of Amended ATC in that

specific adjudication. *See STB Remand Decision* at 12-13. The remand decision modestly expanded the Board's rationale for creating and applying a new revenue allocation method, and attempted to address the method's disproportionate allocation of revenue to the SARR and its diluted accounting for economies of density. *See* Decision, *Western Fuels v. BNSF,* STB Doc. No. 42088 (served June 15, 2012) ("*STB Remand Decision*"). A little more than a month later, BNSF appealed that decision. *See BNSF v. STB,* D.C. Circuit No. 12-1327 (July 23, 2012).

For several reasons, any further application of Amended ATC is very much in doubt. First, it is not clear that the altered revenue allocation method, which the Board created to address a perceived problem in an individual case, was even intended to apply to future cases.[6] *See, e.g., Western Fuels I* at 14 (creating new method to address Board's concern in that particular case that the on-SARR revenue allocation for some low R/VC movements the complainant had selected would be insufficient to cover the defendant's URCS variable costs for the SARR segment); *STB Remand Decision* at 12 ("[Amended] ATC was the Board's solution to accommodate [] two competing principles . . . We do not suggest that this is the only solution or that there may not be other approaches that could better accommodate the two competing principles."). Indeed, Commissioner Begeman dissented from the decision and advocated applying an approach developed through notice-and-comment rulemaking to the *Western Fuels* case, stating

> I cannot support maintaining a *questionable allocation methodology for this case*, while at the same time announcing

[6] The Board created and applied Amended ATC in two parallel cases decided on the same day. Because the Board had adopted this new revenue allocation methodology late in those cases, the Board offered complainants (Western Fuels Association and AEP Texas North) an opportunity to select a new traffic group and present new SAC evidence to be evaluated using Amended ATC. Western Fuels accepted the invitation and filed new evidence, but AEP Texas North declined. Thus, while the Board applied Amended ATC in two individual adjudications simultaneously, the only case in which the Amended ATC method was meaningfully contested or appealed was *Western Fuels*.

> plans to begin a rulemaking proceeding to develop a *superior alternative* . . . that *would* only *be applied to future cases.*

STB Remand Decision at 14 (Begemann, C., dissenting) (emphasis added).

Second, the Board's remand decision is vulnerable to reversal on appeal. NS will not describe here the legal infirmities it has identified in the *STB Remand Decision,* as it is not a party to the appeal. Note, however, that in both the Board's remand decision in *Western Fuels,* and in the NPRM issued five weeks later, the Board essentially endorsed BNSF's proposed alternative revenue allocation method. *See STB Remand Decision* at 12; *Rate Regulation Reforms*, at 17-18. And, the Board's rationale for refusing to consider BNSF's proposal on remand is questionable. *See STB Remand Decision* at 11-14. If Amended ATC were rejected on appeal, then any rate case decision that relied upon that invalid methodology would be subject to reversal (or possibly re-opening by the Board to allow the parties to submit new evidence and apply the valid revenue allocation method, be it ATC or an alternative adopted in the *Rate Regulation Reforms* rulemaking).

Third, while the NPRM is not entirely clear on this point, it appears that the Board may intend to apply any new revenue allocation methodology it adopts in this rulemaking to pending cases. *See* NPRM at 17, n.11 (stating that the Board does not intend to apply proposed new limitations on nature of cross-over traffic itself in pending cases, but making no similar statement with respect to any new cross-over traffic revenue allocation methodology it might adopt). Thus, even if the Board were to prevail in the renewed appeal of its application of Amended ATC in *Western Fuels*, it appears probable that it would apply that flawed method only to that single specific case.

Fourth, the Board has effectively acknowledged that the Amended ATC approach is inferior to at least one other available approach. Amended ATC was an *ad hoc* attempt by the

Board to create a compromise methodology that would both account for economies of density and address the perceived problem of allocations that would result in SARR revenue that is lower than the real world incumbent's URCS variable costs for the segment replicated by the SARR.[7] Even assuming, *arguendo,* that the Board's concern about ATC were valid, the Board has now proposed an alternative method that addresses that perceived problem without doing as much harm to a primary goal of its cost-based allocation approach – accounting for economies of density. *See, Rate Regulation Reforms* NPRM at 17-18. As Commissioner Begeman correctly pointed out, it is not fair to apply an inferior revenue allocation methodology (which disadvantages the defendant carrier) when the Board is in the process of developing a superior method. *See STB Remand Decision* at 13-14.

Thus, presently there is substantial uncertainty concerning the cross-over traffic revenue allocation methodology that the Board will apply in this case. Because of the uncertainty regarding the cross-over traffic revenue allocation method that will apply at the time this case is scheduled to be decided, the best course for both parties and the Board is to hold this case in abeyance until the Board promulgates a superior, uniform, and final cross-over traffic revenue allocation methodology.

2. If this Case Proceeds Without Clarification of the Applicable Cross-over Revenue Allocation Methodology, the Parties' Revenue Evidence Will Be Like "Ships Passing in the Night."

Despite the fact that Amended ATC had been rejected by the D.C. Circuit and any future resuscitation of that method is dependent on the result of ongoing litigation, DuPont chose—at its own peril—to apply that dubious methodology in its evidence in this case. Because Amended

[7] In NS's view, the Board's application of Amended ATC was an unnecessary attempt to "remedy" a non-existent problem. NS does not view SARR revenue allocations below the incumbent's real world URCS costs as inconsistent with SAC principles, implausible, illogical, or otherwise problematic. If the Board does not grant this Motion, NS will explain and support that position in its evidence and argument in this case, and in *Rate Regulation Reforms.*

ATC may not be applied in the present case under applicable law ,and NS intends to apply ATC in its Reply evidence. By holding this case in abeyance during the pendency of the *Rate Regulation Reforms* rulemaking, the Board would avoid presentation of evidence by the parties that does not meet, but rather passes like "ships in the night."

a. DuPont Erroneously Used Amended ATC to Allocate Cross-over Traffic Revenues.

In its opening evidence, DuPont applied the Amended ATC method the Board applied in *Western Fuels. See, e.g.* DuPont Open at III-A-20; DuPont Opening WP "DuPont_ATC_ Methodology.docx." DuPont knew the status of Amended ATC when it filed its evidence. [8] Because it was clear that Amended ATC was not a valid, permissible methodology at any relevant time prior to DuPont's filing of its opening evidence, the Complainant's use of that approach was inappropriate.

On May 11, 2010, the D.C. Circuit issued its decision in BNSF's challenge to the Board's *Western Fuels II* decision. *See BNSF v. STB,* 604 F.3d 602 (D.C. Cir. 2010). That decision granted BNSF's petition for review with respect to the Board's application of the revenue allocation methodology it created in that case, Amended ATC." *See id.* at 613. The D.C. Circuit rejected Amended ATC as explained by the Board, and remanded the case to the Board for further consideration. *See id.* Unless and until the Board developed and presented a complete, sound, and non-arbitrary explanation and justification for creating and applying Amended ATC and judicial challenges to that method had been exhausted, Amended ATC was not a valid method and could not be applied in a SAC case.

[8] Indeed, it is doubtful that cross-over traffic revenue allocation methodology played any significant role in DuPont's traffic selection. Based on NS's review, it appears that DuPont selected as cross-over traffic virtually every movement that touched lines of the SARR, with little or no regard for its relative revenue contribution to the SARR.

Five months later, DuPont filed the present rate case against Norfolk Southern. *See* Complaint, *DuPont v. NS*, STB No. NOR 42125 (Oct. 7, 2010). There can be no dispute that DuPont knew or should have known of the D.C. Circuit decision and remand of *Western Fuels* at the time it filed this case. After extensive discovery, and after DuPont sought and obtained two substantial extensions of the procedural schedule, DuPont filed its opening evidence on April 30, 2012. On May 17, 2012, DuPont filed an extensive Errata making changes to the evidence it had filed on April 30. Importantly, as of May 17, the Board had not issued any decision in the remanded *Western Fuels II* case. When DuPont filed its Errata, the *Western Fuels* remand had been pending for more than two years. It was not until mid-June 2012 – six weeks *after* DuPont filed its Opening Evidence, and well over two years after the D.C. Circuit had remanded the *Western Fuels* decision to the Board—that the Board issued its remand decision attempting to explain its application of Amended ATC in *Western Fuels. See STB Remand Decision* (served June 15, 2012).

Thus, at all times relevant to DuPont's development of its case—including its pre-complaint investigation; its filing of the complaint; during extensive discovery; at the time of its selection of its SARR traffic group and design of the DRR to include large volumes of cross-over traffic and Leapfrog traffic; when it selected interchange points between the DRR and the residual NS; at the time it prepared and filed its opening evidence and case-in-chief; and even when it filed its extensive Errata—DuPont *could not have* reasonably *relied* on Amended ATC being an applicable, valid method of allocating cross-over traffic revenue. Accordingly, DuPont would not be unduly prejudiced if the Board were to reject its cross-over revenue allocation for failure to apply ATC, the only valid revenue allocation methodology then extant.

Therefore, the Board should not be concerned that holding this case in abeyance while it develops cross-over limits and rules in the *Rate Regulation Reform* rulemaking would be unfair to DuPont. The Complainant applied a revenue allocation methodology that was not developed in notice-and-comment rulemaking, that was remanded to the Board on judicial review, and that it therefore knew was not valid and lawfully could not be applied at the time it filed its evidence (because the Board had not issued a remand decision at that time). DuPont made this decision with its eyes open and at its own peril. No reliance-based unfairness to DuPont will result if the Board applies a revenue allocation method promulgated in the *Rate Regulation Reform* rulemaking.

b. *If the Board Does Not Hold This Case in Abeyance Pending Promulgation of New Cross-over Traffic Rules, NS Will Apply ATC in its Reply.*

As discussed, the only lawful cross-over traffic revenue allocation approach in existence today is original ATC. Because DuPont did not apply ATC in its evidence, the parties' evidence will likely be based on different revenue allocation methodologies. In addition, DuPont's application of Amended ATC is riddled with implementation errors that must be corrected before *any* revenue allocation method can be properly applied. When NS corrects all of those errors and applies ATC (a complex process given the unprecedented size and complexity of the SARR and its cross-over traffic volumes), the two parties' cross-over revenue evidence will likely be dramatically different and difficult to reconcile or compare in a meaningful way. Thus, the Board is likely to be presented with Opening and Reply SAC presentations whose traffic and revenue evidence cannot be reconciled or readily compared. The Board should avoid this undesirable result by holding this case in abeyance pending the outcome of *Rate Regulation Reforms.*

II. THE BEST COURSE IS TO HOLD THIS CASE IN ABEYANCE AND CONDUCT AN EXPEDITED RULEMAKING TO DEVELOP SOUND RULES FOR CROSS-OVER TRAFFIC AND REVENUE ALLOCATION, AND THEN APPLY THOSE RULES TO THIS CASE AND FUTURE CASES ALIKE.

The Board should hold this case in abeyance while it develops sound, well-considered rules to govern cross-over traffic revenue allocation and other issues. There are several sound, related reasons why holding this case in abeyance is appropriate.

First, the Board has essentially acknowledged that under existing rules, cross-over traffic has not operated as intended and instead has been used to distort SAC analyses and results. *See Rate Regulation Reforms* at 6-8, 15-18. In no case has that assessment been more true than the present case, in which the Complainant has made extensive use of carload and general freight cross-over traffic and then created Leapfrog movements, which go well beyond any cross-over manipulation previously attempted. It would be arbitrary and unfairly prejudice NS if the Board were to allow DuPont to take advantage of cross-over traffic rules that the Board has admitted are broken and has undertaken to fix.

Second, a rulemaking is a more appropriate forum for the rule changes addressed in *Rate Regulation Reforms*. Both governing law and good regulatory policy require that, when the Board adopts a rule through notice-and-comment rulemaking, any substantial changes or amendments to that rule should also be undertaken only in such a rulemaking, not in an individual adjudication. *See* III, *infra*. The Board appears to have implicitly acknowledged this in two recent decisions.

In the *Western Fuels Remand Decision,* the Board announced that it planned to initiate a rulemaking to develop a better methodology to allocate cross-over traffic revenue, and suggested that in the normal course it may have been appropriate to hold the final *Western Fuels* decision in abeyance pending the completion of that rulemaking and the establishment of an improved

revenue allocation method. *See* STB *Remand Decision* at 12. However, a majority of the Board determined that the extraordinary circumstances of that case – including the fact that the case had already been held in abeyance once and had been pending for eight years – required it to issue its revenue allocation decision in the context of that individual case rather than waiting to apply a new rule developed in a rulemaking proceeding. *See id.* at 12-13.

Less than two weeks ago, the Board initiated a rulemaking process to address cross-over traffic rules and other significant matters. *See* NPRM, *Rate Regulation Reforms*, STB Ex Parte 715. Significantly, the Board chose to address these issues in a rulemaking, *not* in individual adjudications. For major issues and changes to existing rules that may have broad effect on the regulated community and its customers, the Board recognized that the best way to proceed is in a rulemaking proceeding that obtains input from all interested persons. There is no reason to depart from those sound principles in this case.

Third, holding the case in abeyance will save the Board and the parties time and money. If the Board adopts new cross-over traffic rules and revenue allocation methodology during the pendency of this case, presumably NS and/or DuPont would be entitled to an opportunity to submit new evidence, just as Complainants were allowed to submit new evidence in *Western Fuels* when the Board adopted ATC during the pendency of that case. The parties would have invested substantial time and resources to developing extensive SAC evidence, only to have to duplicate that effort and spend more time and money to present new evidence based on the changed rules.

Fourth, holding this case in abeyance would minimize the potential for inconsistent rules and irreconcilable results. Particularly if the Board decided not to allow the parties to submit

new evidence after it adopts new rules, the results in this case and the results in cases adjudicated under the new rules could be very different.

Fifth, if the Board does not hold this case in abeyance while it develops revised rules, it may find itself simultaneously defending multiple appeals and cross-appeals of different sets of potentially inconsistent cross-over traffic rules and revenue allocation methods. Moreover, if rules applied by the Board in this case and other cases are not consistent or treat similarly situated litigants differently, it may be necessary for the Board to re-open this case (either as a result of judicial remand or at the request of a party), take new evidence, and revise its decision. The additional costs of such re-litigation would substantially outweigh any cost or inconvenience to the parties of a temporary suspension of this case while the Board expeditiously develops sound rules that can be applied to all pending and future cases.

Finally, holding this case in abeyance would not materially prejudice either party. DuPont has already sought and received two substantial extensions of the procedural schedule so it should not be heard to complain about what effectively would be another schedule extension – one that is necessary to establish sound cross-over traffic rules and limits that are critical to the validity and analytical integrity of the SAC process.[9]

III. IF THE BOARD DOES NOT HOLD THIS CASE IN ABEYANCE, AS A MATTER OF ADMINISTRATIVE LAW, THE BOARD MUST APPLY ATC IN THIS AND ALL SAC CASES UNTIL IT HAS CONDUCTED A RULEMAKING TO ADOPT A DIFFERENT METHODOLOGY.

Because the Board adopted ATC in notice-and-comment rulemaking, it may amend that methodology only through a notice-and-comment rulemaking. Any substantial change to ATC

[9] As NS has previously advised the Board, the unprecedented complexity of this case and attendant difficulties and computer program and software limitations may require NS to seek an extension of the time to file its Reply evidence. Any such extension would reduce any delay attributable to holding the case in abeyance during the pending rulemaking.

made in an individual adjudication would be unlawful and subject to reversal for violation of the Administrative Procedure Act. As a matter of administrative law, therefore, if the Board does not hold this case in abeyance, it must apply ATC in this case.

A. Establishment of ATC and Status of Board's *Sua Sponte* Application of a Different Approach in *Western Fuels*, an Individual Rate Case.

The Board adopted the ATC cross-over traffic revenue allocation methodology in an extensive notice-and-comment rulemaking proceeding that included three full rounds of extensive comments comprised of thousands of pages of argument and expert testimony; the submission of written and live witness testimony; and a full hearing before the Board. *See* STB Ex Parte 657 (Sub-No. 1), *Major Issues in Rail Rate Cases* (served October 30, 2006) ("*Major Issues*"). NS actively participated in the *Major Issues* rulemaking, and DuPont's interests were represented by its trade association, the National Industrial Transportation League. During the proceeding, all interested parties had more than ample opportunity to comment and provide input. Based on its evaluation of the extensive rulemaking record, the Board adopted ATC as the best method for allocating cross-over traffic revenue. *See Major Issues,* Decision at 31.

Several parties challenged the rules adopted in *Major Issues* – including ATC – before the D.C. Circuit. The Court denied all petitions for review, upholding the new rules in their entirety. *See BNSF et al v. Surface Transportation Board et al,* 526 F.3d 770 (2008). With respect to ATC, the Court concluded that the Board had developed a reasonable method to allocate cross-over revenues while properly taking into account economies of density. *See id.*

In *Western Fuels*, both parties submitted evidence applying the ATC revenue allocation approach adopted in *Major Issues*. But the Board *sua sponte* applied a substantially changed approach that deviated from the judicially approved ATC methodology and significantly diluted the effect of economies of density, the critical feature and innovation of ATC. NS was not a

party to the *Western Fuels* litigation, and thus had no opportunity to comment on the Board's attempted amendment of the ATC rule. Because Amended ATC was rejected on appeal[10], today original ATC remains the only valid cross-over traffic revenue allocation methodology that has been adopted in notice and comment rulemaking and judicially affirmed.[11]

B. A Substantive Rule Adopted in Notice and Comment Rulemaking – Such as ATC – May be Amended Only in a Notice and Comment Rulemaking.

Regardless of the Board's rationale or justification for creating and applying a new revenue allocation methodology in *Western Fuels II,* an agency may not amend through an adjudication a rule adopted through notice and comment. A federal administrative agency like the Board may make a substantial change or amendment to a substantive rule adopted through rulemaking proceeding *only* in another rulemaking proceeding, and not in an individual adjudication. *See* Administrative Procedure Act, 5 U.S.C. §§ 551(5), 553(b)(3)(A).

Applying the APA, the D.C. Circuit has consistently held that an amendment to a legislative rule requires a notice-and-comment rulemaking proceeding. *See, e.g., American Mining Congress v. Mine Safety & Health Administration et al,* 995 F.2d 1106, 1112 (D.C. Cir. 1993). A rule that "effectively amends a prior legislative rule" is itself a legislative rule requiring notice-and-comment rulemaking under the APA. *See United States Telecom Ass'n v. FCC,* 400 F.3d 29, 34-35 (new rules that make substantive changes to existing rules or regulations are legislative rules, subject to APA notice and comment requirements); *Sprint Corp*

[10] As discussed, on appeal the D.C. Circuit affirmed the Board's *Western Fuels* decision on all issues except one – the Board's creation and application of a new revenue methodology (Amended ATC). *See BNSF Railway Co. v. STB,* 604 F.3d 602 (D.C. Cir. May 11, 2010). On that issue, the Court granted the Petition for review, rejecting Amended ATC as inadequately explained and supported, and remanding the case to the Board for further proceedings. The Board recently issued a decision on remand, and BNSF has appealed that decision.

[11] The Board nominally applied Amended ATC in the *AEPCO* decision, but only because the parties agreed it made no difference in that case. *See AEPCO v. BNSF Railway & Union Pacific Railroad,* STB Docket No. 42113 (served Nov. 22, 2011). Moreover, the Board re-opened that proceeding and is presently holding it in abeyance. *See id.,* STB Docket No. 42113 (served Jan 20, 2012). To be clear, NS does not agree to the use of any revenue allocation methodology other than a method adopted by rule. Today, ATC is the only method that meets that requirement.

v. FCC, 315 F.3d 369, 374 (D.C. Cir. 2003); *American Mining Congress*, 995 F.2d 1106 at 1112-13.

Both ATC and Amended ATC are legislative rules[12] (as opposed to interpretive or procedural rules) because they have the force and effect of law and do not fit into the APA's narrow exception to the notice and comment requirement that applies to "rules of agency organization, procedure, or practice." *See James V. Hurson Assocs. v. Glickman*, 229 F.3d 277, 280 (D.C. Cir. 2000) (quoting 5 U.S.C. § 553(b)(3)(A)). The *Western Fuels* change to ATC was an amendment because it sought to make a substantive change to the ATC rule. *See Sprint*, 315 F.3d 369, 374. And, the new rule adopted in *Western Fuels* modified the Board's revenue allocation rule in a manner that is inconsistent with the original ATC. *See American Mining Congress*, 995 F.2d at 1109 ("[i]f a second rule repudiates or is irreconcilable with a prior legislative rule, the second rule must be an amendment of the first," subject to notice and comment requirements); *See National Organization of Veterans Advocates, Inc. v. Secretary of Veterans* Affairs, 260 F.3d 1365, 1375 (Fed. Cir. 2001) (legislative or substantive rules "make new law or modify existing law").

The D.C. Circuit has further established that an agency may not adopt a new position that is inconsistent with an existing rule adopted in a rulemaking without conducting a notice-and-comment rulemaking. As the Court admonished, "an administrative agency may not slip by the notice and comment rule-making requirements needed to amend a rule by merely adopting a *de facto* amendment to its regulation through adjudication." *Marseilles Land and Water Co. v.*

[12] Some federal courts, including the Federal Circuit, use the term "substantive rule" instead of legislative rule. The terms are interchangeable. *See National Organization of Veterans Advocates, Inc. v. Secretary of Veterans* Affairs, 260 F.3d 1365, 1375 (Fed. Cir. 2001) ("Substantive rules [are] those that effect a change in existing law or policy or which affect individual rights or obligations. 'Interpretative rules,' on the other hand, clarify or explain existing law or regulation and are exempt from notice and comment under Section 553(b)(3)(A). An interpretative statement . . . . does not intend to create new rights or duties, but only reminds affected parties of existing duties.").

FERC, 345 F.3d 916, 920 (D.C. Cir. 2003); *see Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 100 (1995) (an agency interpretation that "adopt[s] a new position inconsistent with . . . existing regulations" must follow APA notice and comment procedures). The *Western Fuels* decision *amended* and *substantially changed* the ATC methodology in a manner inconsistent with the existing rule, in part by substantially reducing the effect of economies of density on the allocation of cross-over revenues, which in most instances will result in over-allocation of those revenues to the SARR. Under the APA, the Board's attempted amendment of the ATC rule was unlawful and ineffective, because a legislative rule may not be amended in an individual adjudication such as *Western Fuels.*

Without citing the law, the dissenting commissioner in the Board's recent *Remand Decision* recognized the basic rule that amendment of a legislative rule should be undertaken in a rulemaking proceeding, stating, "I do not believe that [Amended] ATC, which was developed *after* the conclusion of Major Issues, and without an opportunity for public comment, provides for the unbiased revenue allocation approach that was intended." *STB Remand Decision* at 13. The full Board now appears to have recognized that in order to amend the cross-over traffic revenue allocation rule, it must conduct a rulemaking proceeding that gives all interested parties an opportunity to comment. *See* NPRM, *Rate Regulation Reform*, STB Ex Parte No. 715 (July 25, 2012) (commencing rulemaking to address, *inter alia,* cross-over traffic limits and revenue allocation rule).

Thus, even if the Board were able to persuade the D.C. Circuit that it had adequate reason to amend and substantively change ATC by adopting Amended ATC, that action would nonetheless be invalid. The APA requires notice and comment rulemaking to amend a legislative rule. Because the Board failed to comply with that requirement, Amended ATC is

unlawful and invalid. It cannot be applied in this or any other case unless and until it is adopted in notice-and-comment rulemaking.

CONCLUSION

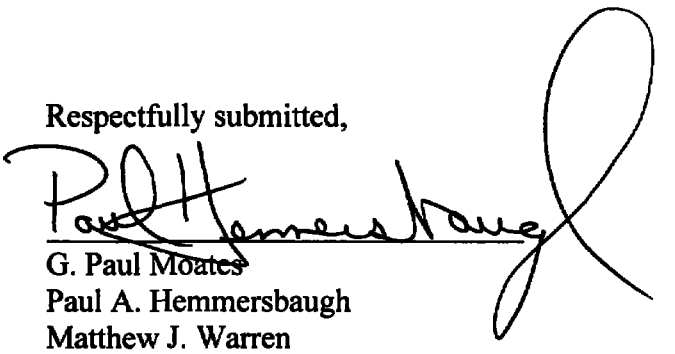
NS's motion to modify the procedural schedule is fairly modest. It asks that the Board hold this case in abeyance for the time it will take to promulgate new cross-over traffic rules and a new revenue allocation methodology in an expedited rulemaking. This is essentially the same sound approach advocated by Commissioner Begeman in *Western Fuels:*

> I believe the Board should initiate a fast-track proceeding to take public comment from interested parties in an effort to determine the best methodology, based on economic principles for allocating cross-over traffic revenues, to the extent that such traffic is appropriate in rate cases. The methodology that results should then be applied to this case.

STB Remand Decision at 13 (C. Begeman, dissenting). She advocated this approach even though the *Western Fuels* case had already been held in abeyance earlier and despite the fact that the case had already taken eight years. *See id.* This case has been pending for less than two years – much of that time resulting from extensions of the procedural schedule requested by DuPont-- roughly the same amount of time that *Western Fuels* had been pending when the Board held that case in abeyance for the *Major Issues* rulemaking. That proceeding, which was not conducted on an expedited basis, concluded in eight months. An expedited rulemaking likely could be completed in a substantially shorter period. What NS is asking is that the Board hold this case in abeyance for a relatively short period in order to allow the Board to develop "the best methodology, based on economic principles for allocating cross-over traffic revenues, to the extent such traffic is appropriate in rate cases," and then to apply the new limits and methodology in this case. *See STB Remand Decision* at 13.

The Board should grant NS's Motion and hold all further proceedings in this case in abeyance until the completion of the *Rate Regulation Reform* rulemaking, STB Ex Parte No. 715, and apply new cross-over traffic and revenue allocation rules promulgated in the rulemaking to this case.

Respectfully submitted,



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Dated: August 10, 2012

Exhibit 1

Exhibit 1

Leapfrog Train #234 Example: Chicago, IL-DRR-Chillicothe, OH-NS-PD Junction, WV-DRR-Petersburg, VA-NS-Norfolk, VA

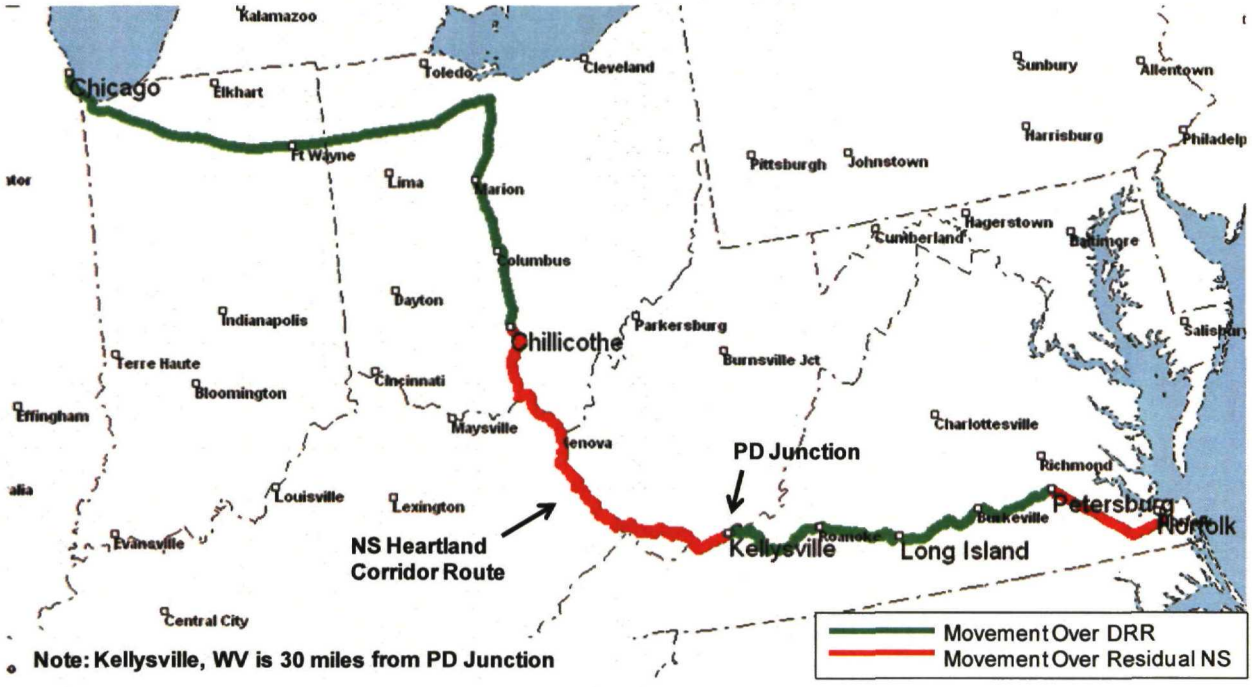

Exhibit 2

Exhibit 2

Leapfrog Train #236 Example: Chicago, IL-DRR-Ft Wayne, IN-NS-Cincinnati, OH-DRR-Emory Gap, TN-NS-Knoxville, TN-DRR-Petersburg, VA-NS-Norfolk, VA

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of August, 2012, I caused a copy of the foregoing Errata to Norfolk Southern Railway Company's Motion to Hold Case in Abeyance Pending Completion of Rulemaking to be served by email and U.S. Mail upon:

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